STATE OF MICHIGAN

COURT OF APPEALS

TITUS MCCLARY, FRANK ROSS, EARL WHEELER, DR. COMER HEATH, HIGHLAND PARK CITY COUNCIL, HIGHLAND PARK REVITALIZATION GROUP 10, L.L.C.,

Plaintiffs-Appellants,

v

STATE GAMING CONTROL BOARD,

Defendant-Appellee.

UNPUBLISHED
July 14, 2005

No. 253011
Wayne Circuit Court
LC No. 03-333949-AZ

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs, who represent various interests that would like to establish casino gaming within the city limits of Highland Park, sought a declaratory judgment holding that 1997 PA 69 (Act 69), which amended the Michigan Gaming Control and Revenue Act,[1] was a local act unconstitutionally enacted without obtaining the approval of a majority vote of the electors in the district affected, as required by Const 1963, art 4, § 29. The trial court determined that Act 69 was a general act not subject to the provisions of Article 4, Section 29, and, consequently, upheld the validity of Act 69. Plaintiffs then appealed to this Court as of right. We affirm.

The constitutionality of a statute is a question of law this Court reviews de novo. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999). A statute is presumed to be constitutional unless its unconstitutionality is clearly apparent. *Id.* at 24. The party challenging a statute's constitutionality has the burden of proving its invalidity. *People v Gregg*, 206 Mich App 208, 210; 520 NW2d 690 (1994). Furthermore, whether the legislation "appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature. . . ." *Doe v Dep't of Social Services*, 439 Mich 650, 681; 487 NW2d 166 (1992).

Under Article 4, Section 29 of Michigan's Constitution, local and special acts cannot be enacted unless certain conditions are met. This section reads:

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[1] MCL 432.210 *et seq*.

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district. [Const 1963, art 4, § 29.]

Plaintiffs contend that, because no city other than Detroit can meet Act 69's definition of city, it is a local act under Article 4, Section 29, and could only be properly enacted by a two-thirds majority of both houses and a majority vote of the electors of the district affected. Because the voters of the district affected did not approve Act 69,[2] plaintiffs argue, this Court must invalidate it as unconstitutional. We disagree.

Act 69 amended an initiated law that appeared on the general election ballot of November 5, 1996, and which, after approval by Michigan voters, became effective on December 5, 1996.[3] Act 69, which was signed into law on July 17, 1997, defined the term 'city' as a "local unit of government other than a county which meets all of the following criteria: (i) Has a population of at least 800,000 at the time a license is issued; (ii) Is located within 100 miles of any other state or country in which gaming was permitted on December 5, 1996; (iii) Had a majority of voters who expressed approval of casino gaming in the city." 1997 PA 69; MCL 432.202(l). At the time Act 69 became effective and continuing to the present, the only local unit of government

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[2] Plaintiffs concede that Act 69 was approved by a ¾ vote of both houses, as is required to amend an initiated law. See Const 1963, art 2, § 9.

[3] An initiated law becomes effective 10 days after the official declaration of the vote, see Const 1963, art 2, § 9, which occurred in this case on November 25, 1996. The petition was popularly know as Proposal E. As it appeared on the ballot, Proposal E stated:

> A Legislative Initiative to Permit Casino Gaming in Qualified Cities
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> The proposed law would:
> 1. Permit up to three gaming casinos in any city that meets the following qualifications: has a population of 800,000 or more; is located within 100 miles of any other state or country in which gaming is permitted; and has had casino gaming approved by a majority of the voters in the city.
> 2. Establish a Gaming Control Board to regulate casino gaming.
> 3. Impose an 18% state tax on gross gaming revenues.
> 4. Allocate 55% of tax revenue to the host city for crime prevention and economic development; allocate remaining 45% of tax funds to state for public education.
>
> Should the proposed law be adopted? Yes (___) No (___).

that has met the population requirement contained in Act 69's definition of the term 'city' is the City of Detroit.

While a population classification will not be sustained where it is a manifest subterfuge, *Avis Rent-A-Car v Romulus*, 400 Mich 337, 345; 254 NW2d 555 (1977), the mere fact that a legislative act contains a population classification that limits the geographic application of the act does not necessarily make the act local or special, *Lucas v Bd of Road Comm'rs*, 131 Mich App 642, 652; 348 NW2d 660 (1984). On the contrary, an act "that contains a population requirement can be sustained as a general act if the statute is applicable whenever the population requirement is met and the population classification bears a reasonable relationship to the purpose of the statute." *Ace Tex Corp v Detroit*, 185 Mich App 609, 618; 463 NW2d 166 (1990). Our Supreme Court has clarified that the "probability or improbability of other counties or cities reaching the statutory standard of population is not the test of a general law." *Dearborn v Bd of Supervisors*, 275 Mich 151, 157; 266 NW2d 304 (1936). Instead, it must be assumed that other local units of government will be able to reach the population goal and other requirements. *Id.*

In this case, the population requirement appears to have a reasonable relationship to the stated purposes of establishing limited casino operations within Michigan and providing for public safety and economic development. By establishing a population requirement, the statute necessarily limits the number of casinos that may be developed. Furthermore, local governmental units with a population of 800,000 or more are likely to have the necessary infrastructure and capability to deal with the demands imposed upon their communities by the development of large scale casino gambling operations and may be in a position to better utilize the economic development that coincides with the establishment of casinos. In addition, without a sufficiently large local population, the profitability of the casino operations may be impaired. Consequently, while we recognize that there are small communities that have successfully maintained casinos, we cannot say that Act 69's population requirement does not bear a reasonable relationship to the purposes of the statute.

Plaintiffs argue that, even if the statute's population requirement can be said to be reasonably related to the purpose of the statute, the additional requirement that the local unit of government be within 100 miles of a state or country that permitted gaming on December 5, 1996, effectively precludes some local governmental units from ever qualifying contrary to the rule as stated in *Dearborn*, *supra*. While it is true that the Court in *Dearborn* stated that the test of a general law based on population requires that it "apply to *all* other municipalities if and when they attain the statutory population," *Dearborn*, *supra* at 156 (emphasis added), the Court recently restated the rule from *Dearborn* as whether "it is possible that other municipalities or counties can qualify for inclusion if their populations change." *Michigan v Wayne Co Clerk*, 466 Mich 640, 642; 648 NW2d 202 (2002). The Court further explained that "where the statute cannot apply to other units of government, that is fatal to its status as a general act." *Id.* at 643. Thus, the rule is whether other municipalities can qualify should their populations reach the

required level and not whether *every* municipality within the state could theoretically meet the requirements.[4]

In this case, the 100-mile rule does not preclude every other unit of government from qualifying under the statute. Indeed, plaintiffs assert that Highland Park meets all of the requirements of Act 69's definition of city except the population requirement.[5] Thus, at least one other unit of government could qualify under Act 69, should its population ever reach 800,000.[6] Therefore, on its face, Act 69 is a general act not subject to the requirements of Const 1963, art 4, § 29.

Plaintiff also argues that, even if Act 69 were a general act on its face, it amended the initiative law, which was a local act, and, therefore, it must also meet the requirements applicable to a local act. We disagree.

An act amending a local act must meet the requirements of Const 1963, art 4, § 29. See *Attorney General v Lindsay*, 221 Mich 533; 191 NW 826 (1923). Thus, if the initiative law were a local act, then Act 69, as an amendment of the initiative law, would need to meet the requirements imposed by Article 4, Section 29. The initiative law, as adopted by the voters, defined the word city in substantially the same way as Act 69.[7] Therefore, for the same reasons noted above, the initiative law was not a local act.[8]

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[4] Under plaintiffs' interpretation of the rule, the legislature would never be able to address the needs of large population centers situated in unique geographic locations. This is not to say that some geographic limitations may be so unrelated to the purposes of the statute that they might, in combination with the population requirement, be "repugnant to the theory of a general law. . . ," *Dearborn*, *supra* at 158, but that is not the case here. The geographic limitation is consistent with the legislative purpose of establishing *limited* casino gaming and directly addresses the problems faced by border communities whose citizens are enticed across the border to partake of gaming opportunities presented by casinos in foreign jurisdictions.

[5] Highland Park is within 100 miles of Canada, a country that permitted gaming on December 5, 1996, and its electorate affirmatively voted to allow casino gaming on September 9, 2003.

[6] In addition, although we do not reach the question, we note that the rather broad definition of gaming within the statute, see MCL 432.202(x), could encompass games offered by several states bordering Michigan. Therefore, in addition to the numerous cities that are within 100 miles of Canada, there may be many other cities in southern and western Michigan that are within 100 miles of a neighboring state that permitted gaming on December 5, 1996.

[7] The initiative defined the word city as "a local unit of government other than a county which meets all of the following criteria: (1) the city has a population of at least 800,000 at the time a license is issued; (2) the city is located within 100 miles of any other state or country in which gaming is permitted; and (3) a majority of the voters of the local unit of government have expressed approval of casino gaming in the city."

[8] Plaintiffs' contention that the preference contained within the initiative law somehow transform the law into a local act is also without merit. The preference is not a condition limiting the application of the law.

The trial court did not err when it determined that Act 69 was not a local act subject to the provisions of Const 1963, art 4, § 29.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot